

stored in digital form, selecting the programming that appeals to the subscriber at any given time. Such a system offers true "video on demand". The subscriber is no longer captive to the scheduling adopted by cable programmers, but can view whatever particular program is desired, whenever it is desired and regardless of what others may be watching. The subscriber can interrupt, replay or fast-forward through the program much as might be done with a video cassette.

As it is being implemented in Orlando, the Full Service Network technology will offer subscribers not only 62 conventional analog cable channels, but also 300 MHz of digital communications capacity devoted to "downstream" bandwidth (i.e., bandwidth devoted to signals inbound to the subscriber's home), and over 100 MHz of "upstream" bandwidth (i.e., bandwidth devoted to communications from the subscriber to others outside the home) in each neighborhood of several hundred subscribers. The Full Service Network will include capacity for interactive video and data services, computer games, telephone communications and other non-video information and services.

TWE's digital switching technology will expand consumer choice to a level where the very concept of a channel loses significance. In both conventional analog cable systems and those that employ digital compression, the cable system provides to each subscriber essentially the

same electronic output, consisting of the array of programming services and other offerings that the operator has elected to make available. Where digital switching is employed, however, each subscriber has the ability to access particular programs at will, regardless of whether those programs are being viewed by others. In effect, subscribers design their own individual "channels" or "programming services", and different subscribers have the ability to watch totally different programs at the same time.

As is immediately apparent, the Commission's proposed channel occupancy limits are fundamentally inconsistent with--and are rendered completely unnecessary by--TWE's digital switching technology. Under the Commission's proposed approach, TWE would be expected to cede control of some 60% of the additional communications capability that it expects to realize by implementing its Full Service Network. TWE cannot be expected to invest the billions of dollars necessary to implement the new technology under such circumstances. Further, there is simply no reason to require TWE to yield control of its innovation-driven communications capability. Where the Full Service Network is available, any incentive to discriminate against unaffiliated video programmers necessarily disappears.

2. The Commission Should Exempt Systems with Expanded Channel Capacity from the Channel Occupancy Limits.

The Commission has indicated that, although it is in favor of eventually establishing a channel capacity threshold beyond which the channel occupancy limits would no longer apply, it believes it would be premature to do so at this time. FNPRM ¶ 226. The Commission reasons that advanced cable technologies are still in their "experimental phases", so that the effects on "the ability of unaffiliated video programmers to obtain access to vertically integrated systems" is unclear. Id. ¶ 227. The Commission proposes to consider adopting a channel occupancy ceiling at a later date, after it has had an opportunity to study the effects of technological developments. Id. Alternatively, the Commission asks whether there is an identifiable channel capacity threshold associated with the next generation of cable technology which would provide an appropriate level beyond which channel occupancy limits should no longer apply. Id.

TWE strongly urges the Commission to establish an upper limit beyond which its channel occupancy rules would not apply. The Commission is surely correct in concluding that "the expanded channel capacity that will result from fiber optic cable and digital compression technology"--not to mention digital switching--"will most likely eliminate

the need for such limits to encourage cable operators to carry unaffiliated or competing programming services".

FNPRM ¶ 226. TWE believes that there is a grave risk that by failing to include such a "ceiling" in its channel occupancy rules at this time, the Commission will actually impair distribution opportunities for unaffiliated program services and will, more generally, interfere with the natural evolution of cable technologies.

Further, TWE believes that the Commission can now identify an appropriate threshold level above which channel occupancy limits should not apply. As discussed more fully below, the upper limit of cable channel capacity using conventional technologies is approximately 75 channels. 3/ Any cable system possessing greater capacity than that is necessarily employing some form of advanced technology. Applying channel occupancy limits to operators who are investing in such technological advances will discourage needed technological investment while serving no useful purpose in terms of congressional objectives. For that reason, TWE believes that the Commission can and should

3/ In its initial Comments, TWE proposed a 54 channel capacity threshold beyond which the channel occupancy limits would no longer apply. TWE Comments at 57; TWE Reply Comments at 39. TWE continues to believe that 54 channels would be an appropriate level for such a threshold. Nonetheless, it proposes a higher threshold here in view of the concerns expressed in the FNPRM.

establish a 75 channel ceiling to its channel occupancy limit.

3. TCI's Proposal Based on Bandwidth Would Better Accommodate Technological Developments, But Must Be Modified to Take Account of the Full Range of Possible Innovation.

The Commission seeks comments on TCI's suggestion that channel occupancy limits be determined by measuring bandwidth rather than traditional channels. ^{4/} FNPRM ¶ 183. The Commission asks whether such an approach would be "more adaptive" to cable systems employing digital signal compression and other advanced delivery technologies, and in particular, how channel occupancy limits should be applied to switched digital video systems. Id.

The TCI proposal is a positive step, but TWE believes that it does not adequately provide for next-generation systems that will employ digital switching technology. Accordingly, TWE strongly urges the Commission to adopt a modified version of the TCI proposal.

As we understand it, TCI proposes to augment the number of channels in its existing cable plant by using

^{4/} TWE strongly agrees with the Commission's proposal to apply the channel occupancy limits only to video programmers that are vertically integrated with the particular cable operator. FNPRM ¶ 180. As discussed at length in TWE's comments, a cable operator simply has no incentive to favor an unaffiliated programmer. In addition, the application of the limits to all vertically integrated programmers would deter investment into new programming. TWE Comments at 45-46; TWE Reply Comments at 30.

video compression technology. This will enable TCI to offer, for example, four channels of programming over the electronic "space" currently used to carry one channel of programming. Using such compression technology at a 4:1 ratio would enable an operator to offer over 200 channels on a system that today delivers 54 channels.

TCI's proposed approach to the channel occupancy limits does not adequately accommodate digital switching technology. As we understand it, under TCI's proposed approach, each 6 MHz of bandwidth is treated as a single unit, and each unit is treated identically. See FNPRM ¶ 176; see also TCI Comments at 38. In a system that uses digital switching, however, not all bandwidth segments have the same operational significance. Those which have digital switching capability possess far more communications capacity. Accordingly, TWE believes that the digitally switched portions should not be treated in the same fashion as other portions of the system's capacity.

TWE proposes a modified version of TCI's suggestion which will accommodate both the compression approach and the digital switching. TWE urges that the Commission apply the 40% channel occupancy limit that it has developed to the first 75 channels of an operator's "uncompressed" channel capacity. A system having 75 channels represents the current "state of the art" in

conventional cable technology. Above 75 channels, however, the channel occupancy limits would not apply.

TWE believes that its proposed approach would address any concern about access of unaffiliated programmers to cable systems, while also preserving incentives for technological innovation and ensuring that, as cable technology advances, the existence of a channel occupancy limits does not stifle needed innovation. 5/

4. The Commission Must Exempt Pay-Per-View Offerings and Non-Video Services from the Channel Occupancy Limits.

In its FNPRM, the Commission has tentatively concluded that channels used for pay-per-view should be covered by the channel occupancy limits. FNPRM ¶ 217. The Commission also suggests that it may be appropriate to apply the channel occupancy limits to the use of cable capacity to provide information and communications services other than video programming. FNPRM ¶ 183.

5/ The Commission also asks whether it should create an exception to the limits that would allow systems to carry additional affiliated services where no unaffiliated service has sought carriage. FNPRM ¶ 184. Such an exception comports with Congress's objective of prescribing "regulations [that] reflect the dynamic nature of the communications marketplace". 47 U.S.C. § 533(f)(2)(E). With advances in the use of digital compression and high capacity cable systems, there is simply no reason to allow unused channels to remain idle where there is programming available to offer to consumers and all unaffiliated services seeking carriage are being offered.

TWE believes that the Commission lacks authority to regulate either pay-per-view offerings or any non-video service. TWE also believes that by subjecting pay-per-view and non-video service to the channel occupancy limits, the Commission would create major obstacles to realizing the full promise of developing cable technology. 6/

Section 11(c) of the 1992 Cable Act does not empower the Commission to regulate all uses that cable operators may make of their communications capacity. Rather, it authorizes the Commission to limit the extent to which system capacity can be occupied by "a video programmer in which a cable operator has an attributable interest". 47 U.S.C. § 533(f)(1)(B) (emphasis added). As the Commission has observed, FNPRM ¶ 167, the purpose of the statute is to limit the ability of cable operators to favor video programmers in which they have an ownership stake over other, unaffiliated programmers.

The Commission plainly lacks authority to regulate "information and communications services" other than video

6/ TWE generally supports the Commission's conclusion that all activated channels, including premium and pay-per-view offerings, should be taken into account in the base against which the channel occupancy limits are applied, and that broadcast, PEG and leased access channels should not be subtracted from that base in determining compliance with the channel occupancy limits. As previously discussed by TWE and noted by the Commission, broadcast, PEG and leased access channels provide unaffiliated services and diverse programming. TWE Comments at 41; TWE Reply Comments at 26; FNPRM ¶ 189.

programming. Section 11(c) addresses the use of cable channels by a "video programmer"; it says nothing about such services as data transmission, telephony, remote shopping and banking services and other non-video services that cable operators may provide to subscribers as greater communications capacity becomes available.

A similar analysis applies to pay-per-view. Although pay-per-view is a type of video programming, it is not the offering of a "video programmer" as that term is commonly understood. A video programmer obtains rights to particular programs and connects them with interstitial material so as to form a continuous, essentially uninterrupted stream of variegated programming. The video programmer's objective is to capture viewers' attention for an extended period of time by offering a succession of attractive programs. In sharp contrast, pay-per-view does not consist of a stream of connected programs, but rather of sequential opportunities to view the same program, and it does not seek to induce extended viewing.

Further, pay-per-view does not raise concerns about possible undue favoritism of affiliated firms. With pay-per-view, the operator does not choose the product of one video programmer to the exclusion of the products of another. Rather, it selects a constantly changing group of movies and events that are offered to subscribers. To argue

that pay-per-view offerings are "vertically integrated" with the cable operator merely because the operator has selected them is absurd--by such reasoning, a completely unaffiliated programming service would become "vertically integrated" with the particular operator merely because the operator decided to offer it to subscribers. Indeed, in a very real sense, the subscriber is the "programmer" with pay-per-view.

Moreover, it is clear that application of the Commission's proposed channel occupancy limits to innovative offerings like pay-per-view would stifle developing cable technology. In fact, application of those limits to pay-per-view could jeopardize TWE's ability to operate a highly advanced cable system that it owns in Queens, New York. It would also impair development of the Full Service Network.

In its cable system located in Queens, TWE offers expanded cable service, called the "Quantum" service, that uses fiber optics and newly developed hardware to deliver the broadest array of programming available to cable subscribers in the world today. Quantum subscribers receive 150 channels of programming--approximately twice as many channels as are available using "state of the art" technology for conventional cable systems.

One noteworthy feature of the Quantum service is pay-per-view. Quantum uses up to 57 of its 150 channels to offer motion pictures and other programming to subscribers

on a pay-per-view basis. Up to 15 different movies are available to Quantum subscribers on this basis on any given day, and an exhibition of each particular motion picture begins at frequent intervals on successive channels (usually 4) dedicated to that film. Thus, the subscriber can watch any of the available movies when it is convenient to do so, rather than according to an arbitrary, externally imposed schedule. The Quantum system thus approaches "video on demand". That this innovative TWE technology greatly enhances subscriber satisfaction is shown, dramatically, by the pay-per-view buy rates of the Quantum offering. Where conventional pay-per-view typically garners subscriber buy rates of approximately 15%, Quantum enjoys a buy rate of over 100%--many the average for conventional pay-per-view. 7/

TWE's Quantum service would appear to be impermissible under the Commission's channel occupancy limits as tentatively formulated in the FNPRM. Taking 40% of all of Quantum's 150 activated channels would yield 60 channels which could be devoted to "vertically integrated" programming. Quantum uses nearly that many channels merely to deliver pay-per-view. If the proposed channel occupancy

7/ The buy-rate is the ratio of the number of purchases in a given month to the number of addressable subscribers. Thus, if every addressable subscriber places a single order in a given month, the buy-rate is 100%.

limit applies to pay-per-view, TWE would be compelled either to discontinue its innovative pay-per-view experiment or to forego offering such popular cable services as CNN, HBO, TNT, Headline News, E!, Comedy Central, Court TV or Cinemax.

TWE believes that no useful purpose would be served by putting it to such a choice. Quantum's capacity is such that there cannot be any real concern about discrimination against unaffiliated services. For that reason alone, there would not appear to be any reason to constrain TWE's ability to offer pay-per-view.

Application of the proposed channel occupancy limit to pay-per-view would also jeopardize development of the Full Service Network. Of necessity, the digitally switched portion of the Full Service Network will provide an enormous--indeed, a virtually limitless--pay-per-view offering. That is the inherent nature of video on demand and, as a practical matter, the Full Service Network's capacity is so great that it could not be programmed any other way. Limiting use of the Full Service Network for pay-per-view would discourage firms like TWE from continuing to develop and invest in innovative technology. Congress did not intend such a result.

C. The Commission's Attribution Criteria Should Be Sufficiently Flexible to Avoid Penalizing Investment in New Programming.

The Commission has concluded that it should apply the broadcast attribution criteria of Section 73.3555 of its Rules for purposes of the channel occupancy limits, stating its belief that those criteria are "strict enough to identify all interests that afford the potential to exert influence or control over management or programming decisions, yet flexible enough to permit continued MSO investment in new programming services". FNPRM ¶ 201 (footnote omitted). The Commission asks whether there are any modifications or additional exceptions that should be made to the broadcast attribution criteria to better adapt them for purposes of the channel occupancy limits. In particular, the Commission asks whether a higher equity threshold should be adopted where more than one MSO holds a minority interest in the programming service. FNPRM ¶ 202. Although TWE continues to believe that attribution should be based on actual management control (See, TWE Comments at 37-40; TWE Reply Comments at 23), TWE also believes that if the Commission does proceed to adopt the broadcast attribution criteria, a modification for minority investments by multiple MSOs would be appropriate.

Where multiple MSOs each hold a minority interest in a particular programming service, TWE submits that the better approach would be to apply an attribution threshold higher than the 5% threshold set forth in the broadcast attribution rules. As TWE noted previously, investments in new programming services are highly risky, so that operators frequently take only a minority position in a new service. TWE Comments 37-39. Thus, there are a number of program services in which each of several MSOs holds an investment, with none having a controlling interest. Precisely because such minority investments enable operators to take the risk of bringing new programming services into the marketplace, setting the attribution threshold at the low level of 5% will discourage investment in new programming. In this connection, TWE submits that, where multiple MSOs have invested in a program service, the service should be attributable only to those MSOs who have an equity interest in the service of 25% or more. 8/

8/ With respect to the Commission's suggestion that the equity threshold be increased for new programming services (FNPRM ¶ 202), TWE continues to believe that it would be preferable to exempt from the channel occupancy limits those program services that have widespread distribution among unaffiliated cable operators, as discussed more fully below. See pp. 34-36 infra.

D. Local and Regional Services Should be Excepted from the Channel Occupancy Limits.

In its FNPRM, the Commission proposes to except local and regional programming services from the channel occupancy limits in order to encourage the development of local cable programming. TWE fully supports the Commission's approach in this area. Local and regional services respond to particular needs and tastes of local audiences. As the Commission points out (FNPRM ¶ 219, n. 218), a "primary objective and benefit" of federal regulation is "the local origination of programming". 1992 Cable Act § 2(a)(10).

Absent an exemption from the channel occupancy limits, it is abundantly clear that those limits would stifle the development of innovative local programming. For example, in its New York City cable systems, TWE has recently created a programming service called "New York 1", a 24-hour, all-news service that focuses on news and events in the New York City area. Including New York 1 in the channel occupancy calculation for TWE's New York City area systems would obviously constrain the ability of those systems to offer New York 1. Because cable subscribers in the New York City area are the only ones likely to be interested in such a service, applying the channel occupancy

limits to New York 1 would ultimately discourage TWE from offering the service at all.

The Commission asks for suggestions concerning an appropriate definition for local and regional programming services that would qualify for this exemption. TWE believes that the Commission should craft its definition broadly so as to ensure that any programming service that is distributed on less than a national basis would be covered. Indeed, the simplest definitional mechanism would be to draft the channel occupancy limit so that it applies only to programming services that are distributed nationally. 9/

E. TWE Continues to Believe that an Exemption for Programming Services That Have Demonstrated Their Popularity Among Unaffiliated Cable Operators Is Necessary to Preserve Incentives to Invest in Programming.

In its FNPRM, the Commission rejects the suggestion, made by TWE and other commenters, that the

9/ In its discussion of the proposed 40% limitation, the Commission proposes to allow carriage of additional vertically integrated services, beyond the proposed 40% limit, if such services are minority-controlled or are targeted to a minority audience. FNPRM ¶ 207. TWE believes that such an exception to the channel occupancy limits would encourage additional minority ownership and thus the diversity of programming. Nonetheless, TWE also believes that the Commission's proposal tends to highlight the fundamental constitutional infirmity of the 1992 Cable Act. See Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam) ("the concept that government may restrict the speech of some elements of our society to enhance the relative voice of others is wholly foreign to the First Amendment").

channel occupancy limits should not apply to program services that are widely distributed by cable operators unaffiliated with the particular service. See TWE Comments at 54-56; TWE Reply Comments at 36-37. The Commission concluded that such an exception would not serve Congress's objectives because, in its view, there is only a "minimal" risk that such popular programming services would be dropped from cable systems as a result of the channel occupancy limits. FNPRM ¶ 220. TWE believes the Commission may have misapprehended TWE's argument on this score.

It is the very fact that a cable operator would not ordinarily drop well-known, popular programming services that makes an exemption for such services necessary. When channel occupancy limits confront an operator with a choice between a popular, well-established service on the one hand, and a new, relatively untested, fledgling service on the other hand, cable operators will inevitably tend to drop, or decline to carry, the new, untested service. Hence, the existence of such disincentives to distribution will discourage cable operators from investing in new programming services in the first place. Thus, unless well-established, proven programming services are exempted from the channel occupancy limits, their very popularity will tend to diminish opportunities for new services, and thus diminish incentives to invest in new services. For that reason, TWE

continues to believe that an exception for proven popular services is essential.

In this connection, the Commission also asks whether it should exempt new programming services from channel occupancy limits for a period of five years. FNPRM ¶ 221. TWE continues to believe that the more sensible approach would be to exempt those services that have already demonstrated their popularity, for an operator's decision to carry such services would presumably be based upon their popularity, rather than upon "favoritism" toward an affiliated service. Nonetheless, if the Commission continues to believe that an exception for popular services is unwarranted, then TWE submits that an exemption for new services would be desirable. Indeed, if established services are fully covered by the limits, then an exemption for new services becomes necessary in order to eliminate the disincentives toward investment in such services that are discussed above. 10/

10/ The Commission also asks whether it should grant waivers to permit carriage of new programming services in appropriate circumstances. FNPRM ¶ 221. TWE believes that such a procedure would be unnecessarily cumbersome and doubts that appropriate criteria for granting such waivers exist. TWE believes that the national interest in ensuring the continued development of video programming is far better served by excepting from channel occupancy limits those program services that have proven their popularity with unaffiliated operators.

F. Other Issues.

The Commission raises several other issues in its FNPRM. These are discussed separately below.

1. The Channel Occupancy Limits Should Not Apply in Areas Where Effective Competition Has Developed.

TWE agrees with the Commission's proposal to eliminate channel occupancy limits in communities where effective competition exists. FNPRM ¶ 231. TWE believes that the channel occupancy limits should be automatically phased out where effective competition, as defined under Section 3 of the 1992 Cable Act, has developed. FNPRM ¶ 232. The definition of effective competition is set out in Section 3, and it would be an unnecessary burden, on both the Commission and cable operators, to require that a waiver be obtained. For substantially the reasons discussed above with respect to the subscriber limits, see pp. 10-11 supra, TWE also believes that the channel occupancy limits should be phased out where any form of effective competition exists.

2. Existing Vertically Integrated Relationships Should Be Grandfathered.

TWE strongly supports the Commission's proposal to grandfather all vertically integrated relationships which exceed the channel occupancy limits. FNPRM ¶ 236. As noted by the Commission, this approach will serve the public

additionally, will not disrupt existing affiliation agreements. FNPRM ¶ 237. Moreover, this approach is consistent with the approach adopted by the Commission in the broadcast context under § 73.3555. ^{11/} TWE also believes, however, that grandfathering should take place as of the effective date of the Commission's final rules.

3. The Channel Occupancy Limits Should Be Enforced on a Complaint Basis.

TWE supports the Commission's proposal to retain responsibility for enforcement of the channel occupancy limits. FNPRM ¶ 242. As TWE previously emphasized, enforcement by local franchising authorities would create administrative burdens and inconsistency in the enforcement of the limits. TWE Comments at 59; TWE Reply Comments at 41.

TWE urges the Commission to enforce the limits on a complaint basis only. Although the Commission has tentatively rejected this approach, TWE continues to believe that enforcement on a complaint basis would adequately ensure compliance with the limits without creating overly-burdensome oversight obligations on the Commission. FNPRM ¶ 242. The Commission objects to complaint-based enforcement on the basis that the channel occupancy limit is

^{11/} See 47 C.F.R. § 73.3555 n.4 (stating that broadcast multiple ownership regulations "will not be applied so as to require divestiture...of existing facilities").

"structural" in character, and that enforcing the limits only upon complaint could deprive consumers of the diversity benefits intended by Congress. Id. Complaint-based enforcement, however, would not jeopardize congressional policy in this field. The threat of enforcement by unaffiliated programmers should be sufficient to ensure that channel occupancy limits are observed.

Conclusion

TWE urges the Commission to adopt exclusively national subscriber limits to avoid jeopardizing valuable efficiencies associated with regional concentration and to prevent interference with the development of new cable technologies. The Commission should adopt a subscriber limit in the range of 30% to 40% that takes into account subscribership achieved by multi-channel video distributors other than traditional cable operators. Areas where "effective competition" exists under the "less than 30 percent" provision should not be considered in the application of subscriber limits. The Commission's attribution standards should focus on management control; at a minimum, 25% ownership should be required for attribution. Enforcement of the subscriber limits should be at the Commission's own initiative, without a system of certification. Waivers should be obtainable for MSOs who commit de minimis violations, seek to expand into unserved

rural areas, and in other appropriate circumstances. The Commission should review the subscriber limits every five years.

With regard to channel occupancy limits, the Commission should craft limits to avoid interfering with technological development in cable communications. The Commission should take account of the full range of possible innovation by applying channel occupancy limits only to the first 75 channels of an operator's channel capacity. TWE believes that the Commission lacks authority to regulate pay-per-view offerings and non-video services under the channel occupancy limits and that including them under the limits will discourage technological innovation. Although TWE continues to believe that attribution criteria for the purposes of channel occupancy limits should be based on actual management control, if the Commission does adopt the broadcast attribution criteria, TWE urges the Commission to adopt an attribution threshold of 25% where multiple MSOs have invested in a program service. Channel occupancy limits should apply only to services that are distributed nationally, not to local or regional services. TWE continues to support an exemption for programming services that have demonstrated their popularity among unaffiliated cable operators. The Commission should not apply the channel occupancy limits in areas where effective

competition has developed and should grandfather vertically integrated relationships that exceed the limits. Finally, TWE supports the Commission's proposal to retain responsibility for enforcement of the channel occupancy limits, and enforcement should be done on a complaint basis only.

August 23, 1993

Respectfully submitted,

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